WEATHERTIGHT HOMES TRIBUNAL

CLAIM NO: TRI-2008-101-109

BETWEEN	**Alister Holden & Murray Bridge as Trustees of the Estate of Bruce Morris** Claimants
AND	**Vivienne Smitheram & Bernard McBride** Claimants
AND	**Peter Hanns trading as Hanns Builders & Joiners** First Respondent
AND	**Roger Walker Architects Ltd** Second Respondent
AND	**Wellington City Council** Third Respondent
AND	**Dion Bareta (REMOVED)** Fourth Respondent
AND	**K Road No 1 Limited** Fifth Respondent
AND	**Stoanz Limited (REMOVED)** Sixth Respondent

PROCEDURAL ORDER NO. 7
Dated 1 September 2009

Contents

Conference

1. I convened a conference on this claim on 24 August 2009.

   Those present were:

   - Roger Pitchforth, Tribunal Member,
   - Sharnel Kapua, Case Manager,
   - Matthew Sherwood-King (for the claimants),
   - Peter Hanns and Trina Lincoln (for the first respondent),
   - Roger Walker and Chris Corry (for the second respondent),
   - Sarah Macky (for the third respondent),
   - Brian Greenall (for Equus Industries Limited).

Jurisdiction

2. The claim has been consolidated with case No TRI-2009-101-48 for the purposes of the hearing to ensure that evidence and other matters are dealt with efficiently.

Removal of parties

3. Section 112 of the Act provides that the tribunal may order that a party be struck out of adjudication proceedings if it is fair and appropriate in all the circumstances. It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is untenable in fact and law. An adjudicator should not attempt to resolve genuinely disputed issues of fact unless he or she has all the necessary material before him or her. Even then the jurisdiction to strike out should be exercised judiciously and sparingly because evidence is often disputed and requires testing and determination at hearing.

4. Where, however, a party is opposing an application for removal on the basis of disputed facts they must produce or point to some cogent evidence in support of their opposition. It is insufficient to say that there are disputed facts without providing some detail of what they are. In addition it is insufficient to say there could be disputed facts or to require the Tribunal to go on a fishing expedition to see if some conflicting evidence may arise in the course of adjudication.

Roger Walker Architects Limited

5. The second respondent Roger Walker Architects Limited applied to be removed from claim No TRI-2009-101-48 (Smitheram etc).

6. The grounds of the application are that the second respondent completed the work of designing the building at 105 Pirie Street more than ten years before the application for the assessor's report. The applicant relies on s 4 Limitation Act 1950 and s 393 Building Act 2004.

7. The application for the Assessor's report was made on 5 August 2008, so the cause of action must have arisen within 6 years before that date to be a valid claim. This is not disputed by the applicant.

8. Accepting that the claim is within time under the Limitation Act, the applicant says that the work referred to is outside of the time set by the Building Act, namely the ten-year period before 5 August 2008.

9. The claimant disputes that the applicant did no work within the ten year period and alleges that the applicant was supervising the building. The claimant refers to plans dated 18 August 1998 appended to the Assessor's report. Variation documents and architects directions are dated September, October and November 1998 and beyond. The applicant has produced in discovery a letter dated 23 December 1999 relating to the project.

10. This evidence will need to be explored at the hearing. The evidence currently before me does not establish the claims against the second respondent, Roger Walker Architects Limited, are so untenable in fact and law as to be incapable of success. In addition it would appear there may be genuinely disputed issues

of fact. Therefore it would not be fair and appropriate to order the removal at this stage in the proceedings.

11. If the applicant intends to proceed with the limitation defence it should make this known to all parties well before documents are due.

Joinder

12. Section 111 of the Weathertight Homes Resolution Services Act 2006 (The Act) provides that the tribunal may order that a person be joined as a respondent to the adjudication if it considers that:

    a). The person ought to be bound by, or have the benefit of, an order of the Tribunal; or
    b). The persons interests are affected by the adjudication; or
    c). For any other reason it is desirable that the person be joined as a Respondent.

13. In order to meet these criteria, tenable evidence of the proposed party's breach of duty and a causative link to the remedial work is generally required. In other words an arguable fact or foundation is required for a party to be joined.

K Road No 1 Limited

14. The Second respondent Roger Walker Architects Limited has applied to Join K Road No 1 Limited. The proposed party is a party in the other case consolidated with case TRI-2009-101-48.

15. There was no opposition to the move and K Road No 1 limited is duly joined.

Equus Industries Limited (Equus)

16. The Second respondent, Roger Walker Architects Limited, applied for joinder of Equus Industries Limited to both cases. This is a rehearing in reference to claim 109 but a new issue for claim 48.

17. The grounds for seeking the joinder are that the Equus system was used but Equus breached its duty of care and was negligent in allowing the system to be applied so that the buildings leaked.

Background

Allegations against Equus

18. Equus manufactures the THERMEXX cladding system. As it said in its brochure:-

> The THERMEXX Insulating Wall Cladding system is applied over many stable building materials. Fire resistant polystyrene foam forms the insulation layer. This is overcoated with a layer of THERMEXX REINFORCED with fibreglass cloth. A range of Equus coating systems from very fine to very coarse textures if available to choose from for the final finish. The applied THERMEXX system is vapour permeable, thus minimising problems associated with condensation.

19. Equus marketed this system and Mr Walker specified the system in the houses in this dispute.

20. There is no dispute about the quality of the manufactured materials.

21. The applicant says that the system was specified because it was said to be flexible and professional tradesmen were required to apply the product. These two claims are said to be the basis for liability.

22. According to the brochure, the installation was to be carried out by applicators approved by Equus to do the work, implying, says the applicant, that the work would be performed by people who, after training and instruction from Equus, and after assessment by Equus, were properly qualified to be approved by Equus to be a THERMEXX installer.

23. The applicant says that the installer failed to properly install the system. The system has failed and water has penetrated the building.

24. The applicant says that Equus accepted the representations contained in its literature and any other representations by specifying that the work was to be done by an approved applicator or by a THERMEXX installer. The surface pre-

treatment was also the responsibility of the installer. The installer was not properly trained.

25. The applicant says that Equus had a duty to ensure that only approved applicators and/or THERMEXX installers were permitted to install the Equus weathertight systems. It alleges that Equus failed to perform its representation that the system would be so installed and allowed an untrained applicator to install the cladding using Equus products.

26. Equus failed in its duty because it allowed Stoanz, as Equus' agent, to nominate persons who were supposedly qualified to act as licensed applicators or THERMEXX installers. Stoanz recommended the company that is now K Road No 1 Limited, (K Rd). The applicant says that K Rd was not qualified in either way.

27. The applicant further says that Equus knew or ought to have known that its agent was selling the THERMEXX system to a company that was not qualified.

28. Alternatively, if K Rd was a licensed applicator, it received no training.

29. The applicant points to the assessor's report and the leaks identified at the junction between the cladding and the windows and doors. The failures are said to be not following details specified by Equus (of which the applicator was not made aware) as well as workmanship deficiencies.

30. The negligence of Equus is said to be:-

- Failure to instruct the applicator how to install elements of the Equus system so that water penetration would not occur ;
- Promoting a system without ensuring that the approved applicator was properly instructed in the correct method of installing the Equus system ; or
- Failing to prevent non-approved applicators from installing a system that required professional and superior trained tradesmen to install all aspects of the Equus weathertight cladding system.

Equus reply

31. Equus say it is a materials supplier and accordingly had no part in the construction of the houses. Its agent, Stoanz similarly only supplied materials.

32. Equus dispute that the assessor finds that the coating is the source of the leaks. It is the windows in both buildings.

33. Equus say that they accept the following facts:-

    - The assessor's report indicates that there is incorrect or insufficient detail round some of the windows on each dwelling that suggest negligent application.
    - The application was undertaken by K Rd.
    - K Rd was approved as an applicator of THERMEXX plaster systems in about 1995 or 1996. They had been applying the system for about two years before the application on the houses in dispute. There are no other disputes, indicating that they were generally competent.

34. Equus argue that a system of approved training is not a warranty for all purposes. A failure on one job does not demonstrate a deficient training and approval system. There is nothing in the training or approval process that led, in some foreseeable way, to the alleged defects of the property. It is too remote to be liable.

35. Equus says there is no cogent evidence of negligence and no proof of an error.

Discussion

36. The parties agree that there is no complaint about the materials. It is also agreed that Equus was not involved in any way on site and did anything other than supply materials.

Duty of care

37. It is fundamental for any allegation of negligence to be based on a duty of care[1].

[1] *Grant v Australian Knitting Mills Ltd*, [1936] AC 85, 103 (PC) per Lord Wright.

38. In many situations the duty of care has been established in prior cases.

39. There is not usually a duty of care for economic loss resulting from poorly built buildings.

40. In relation to domestic buildings *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (C: [1996] 1 NZLR 513 (PC) rescued the doctrine in *Anns* for New Zealand purposes and allowed a houseowner to claim for negligence resulting in economic loss in cases involving dwellinghouses.

41. In the present case, the situation is as set out in Todd relying on Rolls Royce:-

> Finally, the cases about defective buildings illustrate the difficulty facing the courts in setting a standard of quality in tort action for negligence that can operate independently of the contractual specifications pursuant to which the work was done. The standard of care expected of the builder of a dwellinghouse is to take reasonable care to build a reasonably sound structure, using good materials and workmanlike practices. Yet the terms of the contract pursuant to which the work was done, to which a subsequent owner is not a party, may lay down a different standard, or may purport to limit or exclude any duty. The problem of disconformity between the obligation in contract and that in tort was a significant reason why the House of Lords decided to reject the tort duty altogether. The courts in New Zealand and Australia have been prepared to uphold a duty with an objectively determined standard in the case of houses, but they have also recognised in the case of commercial construction contracts involving detailed contractual matrices the disconformity problem is likely to be acute. So in cases of this kind they have held that there can be no duty in tort operating independently of any contractual obligation assumed by the builder or engineer.[2]

42. There is no duty of care at common law in the situation that arises in the present case unless it can be drawn into the law relating to domestic houses.

43. In relation to domestic dwellings the question is whether, or the extent to which, a party to the building process, in the absence of any contract, may be liable to the owner in respect of putting right any defect. The claim is not for damage done to the property but rather is for the owner's disappointed expectation as to

[2] Todd p 152.

the true value of the property. The loss is the loss suffered by acquiring a defective property.[3] It is an economic loss.

44. In cases where there is doubt as to whether there is a duty of care the courts look first to the foreseeability of the injury to their 'neighbour' and secondly the broader implications for the community in recognising or denying a duty.[4]

45. It was argued that if the training was inadequate that it would be foreseeable that the trainee as an employee of another contractor would apply the coating to a house which would leak. There are too many links in the chain between the two events for this to be foreseeable.

46. The applicants contentions do not show that Equus owes a duty of care to the applicant in the current situation.

Breach of Duty of care

47. If I am wrong, and it should be the case that there is a duty of care in such circumstances, has it been beached?

48. The duty can only be to provide the goods in accordance with the contract. The contract was with a vendor that in turn contracted with the applicator, K Rd. K Rd contracted with the builder Hanns, and they in turn with Walker. The terms of the various contracts varied with the roles of the participants. K Rd is a party to this matter.

49. The applicant says that it was a term of the contract that, inter alia, the applicators would be properly trained. The duty to train properly has been breached. The evidence offered is that the applicator allegedly made a mistake in applying the cladding.

50. There is no evidence of the nature of training or whether the worker concerned undertook the training. There is no evidence to show that misapplication of the cladding was the result of poor training rather than inattention or carelessness.

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[3] See Todd pp 266-267.

[4] *Rolls Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324 and Todd (Ed) *The Law of Torts In New Zealand*, Thomson Reuters, Wellington, 2009. (Todd) p142.

51. Ms Lincoln suggested that a teacher might be liable for a negligent student's subsequent actions in the workforce, on the basis that they have not been well taught.

52. This seems to be a novel example of a possible duty of care and one which it is not for the tribunal to pioneer.

Damage caused by breach of duty of care

53. If there was damage it could only be economic damage between commercial parties. There is no claim made in contract for damage and there is none proven in this case.

Damage not too remote

54. Finally there seems to be an insufficient connection with the damage to include the manufacturer's training as part of the cause of damage. It is too remote.

55. I am not satisfied from the information provided that there are grounds for joining Equus to these proceedings. The application is refused.

Hannah Papadopolous

56. The application to join Mrs Papadopolous was deferred as the applicant had not served the application.

Consequences of joinder

57. An amended schedule for both cases showing the names and addresses of the parties and their counsel or representatives is attached.

58. Each newly joined party is to be served with this procedural order together with other relevant documents including the WHRS Assessor's report forthwith.

59. The newly joined party is required to produce or make available for inspection all relevant documents relating to this claim that may be in their possession or

that they have access to. This can be arranged direct with the other parties or through the Case Manager and is to be carried out by the date set out in the timetable below.

60. The newly joined party is to attend the future conferences and attend the mediation and hearings scheduled.

61. If any party has a claim against a newly joined party they should file that claim with the case manager forthwith.

Documents

62. The parties are to provide to the case manager forthwith:

(a) **All relevant non-privileged documents** that they have in their possession or control that relate to the design, development and construction, inspection or sale and purchase in relation to the property in dispute. The documents include (but are not limited to) plans and specifications, contracts, correspondence, site meeting minutes, diary notes, invoices and receipts and photographs of the construction work inspection reports and other communications between them or between any of the above parties and any other person, company or entity involved in the design development and construction. Documents should also include matters relating to maintenance.

(b) **A summary sheet** noting all key documents that the party may wish to rely upon in relation to these proceedings

(c) **Written confirmation** that they hold no other relevant documents

63. The case manager will circulate copies of all documents to the parties.

Timetabling

64. Hannah Papadopoulos has until 04 September 2009 to file a response to the joinder application.

65. The date of hearing this application for joinder shall be 07 September 2009 at 2.15 p.m. (phone conference).

66. The date by which newly joined parties shall provide documents and make any applications shall be 18 September 2009.

67. Mediation will take place on 13 October 2009. The time and place will be set by the case manager.

68. There will be a pre- mediation conference on 05 October 2009 at 11.30 a.m.

69. If the mediation does not result in full settlement the case manager will contact the parties to confirm the dates for the following procedural steps.

70. All witness statements and evidence upon which the claimant seeks to rely is to be filed with the Tribunal by 30 October 2009.

71. All respondents are to file their witness statements and other evidence that they will seek to rely upon at the Tribunal hearing by 06 November 2009.

72. All replies to the witness statements and other evidence to be presented are to be filed by 13 November 2009.

73. If necessary, an **experts conference** will be called on 17 November 2009 for the purposes of ascertaining on what matters the experts agree, on what they disagree and why they disagree. The meeting will be chaired by a WHT tribunal member or nominee and a report will be prepared[5]. Parties should refer to the Chair's Directions relating to expert conferences. This document can be obtained from the case manager or the tribunal website.

74. A **hearing** will take place approximately 20 working days of the matter being referred back to the Tribunal. It is expected that the hearing will start on 2 December 2009.

75. There will be a teleconference of all parties/counsel to finalise arrangements for the hearing including which witnesses are required to attend and when at 11.30

a.m. on 23 November 2009. By that time all parties are to have advised the Case Manager in writing of the names of the witnesses they wish to appear at the hearing to be questioned.

DATED the 1st day of September 2009.

Roger Pitchforth
Tribunal Member

[5] Section 10, Chair's directions.